United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by:
JOYCE KRUTICK BARLOW

77-1210

B P/S

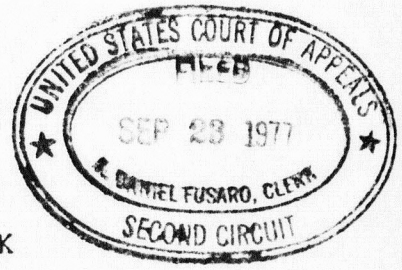
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Respondent

against-

TERRENCE R. IRVING,

Defendant - Appellant



APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S
REPLY BRIEF

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Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent,

-against-

TERRENCE R. IRVING,

Defendant-Appellant.

----------x

REPLY BRIEF FOR DEFENDANT-APPELLANT
TERRENCE R. IRVING

PRELIMINARY STATEMENT

Appellant Irving, in her reply brief, will address herself to the Government's Point I.

POINT I

THE DEFENDANT, IN OPEN COURT, WAIVED NEW RIGHT TO INDICTMENT. THUS, THE GOVERNMENT'S RELIANCE UPON THE PREMISE THAT A DEFENDANT'S FIFTH AMENDMENT PRIVILEGE MAY NOT BE ASSERTED BY COUNSEL IS WHOLLY WITHOUT MERIT

The government, in its brief, asserts that a defendant's privilege against self incrimination may not be asserted by counsel on behalf of a client. This argument is used to buttress the government's claim that Ms. Irving didn't personally waive her right to be prosecuted. Such a claim is without merit since counsel, in open court with the defendant present, stated defendant's intention to waive indictment.

In support of its argument, the government relies on cases not relevant to the issue at bar. In ROGERS v. U.S. 340 U.S. 367, a defendant refused to name before the Grand Jury a third party alleged to be a communist. The defendant's attorney stated that she would not testify. The Court held that the Fifth Amendment to the United States Constitution does not protect third parties and cannot be asserted in that manner.

In COUCH v. U.S. 409 U.S. 322 (1973), a summons was directed to an accountant to produce his client's business tax records. It was held that the client's privilege could not be asserted

as to the documents, by the accountant. Similarly, in U.S. v. WHITE 322 U.S. 694, the respondent was a union official who tried to assert the Fifth Amendment privilege on behalf of the union. This was held impermissible. Each of the government's citations relate to this type of situation.

The government attempts to persuade this Court that the HENKEL cases (HALE v. HENKEL, 201 U.S. 43, and McALISTER v. HENKEL, 201 U.S. 90), stand for the proposition that an agent may not assert the Fifth Amendment privilege on behalf of his principal. This is, however, not quite accurate. These cases represent situations in which corporate officers attempted to use the privilege to prevent the turnover of writings and documents belonging to the corporation.

In the case at bar, the defendant, by her attorney and in open Court, indicated that she wished to waive indictment. She did not attempt to assert any claims on behalf of third parties. Thus, the government's attempt at analogy fails. The cases cited bear no relationship to the case at bar.

CONCLUSION

Appellant, relying upon those points asserted in her brief and reply brief, submits to this Court.that her rights under the Constitution were patently violated by the conduct of the government in refusing to accept her waiver of indictment. Appellant further submits that the government's failure to timely file the superseding indictment constituted improper conduct. Upon all the grounds alleged, appellant contends that this conviction be reversed.

Dated: New York, N. Y.
September 15, 1977

Respectfully submitted,
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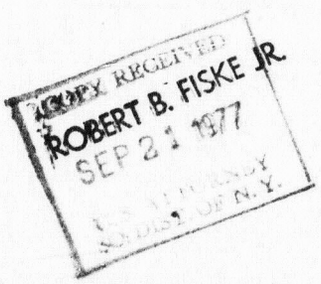
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